No. 929 85

In the Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Labor Relations Board prays that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on February 18, 1960, which denies enforcement of the reimbursement provisions of the Board's order.

OPINIONS BELOW

The opinions of the court of appeals (Appendix, pp. 9–12, *infra*) are not yet officially reported. The findings of fact, conclusions of law, and order of the Board (R. 37–44)[1] are reported at 121 NLRB 1629.

[1] "R" references are to the portions of the record printed in the Joint Appendix in the court below.

JURISDICTION

The judgment of the court of appeals (Appendix, pp. 13–14, *infra*) was entered on February 18, 1960, and its decree (Appendix, pp. 14–18, *infra*) was entered on March 10, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board, as a remedy for a hiring arrangement which has been found to coerce employees and encourage union membership in violation of Sections 8(b) (1)(A) and (2) of the National Labor Relations Act, may require that the employees be reimbursed for all dues and initiation fees which they paid to the union under the illegal arrangement.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*, are as follows:

> SEC. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;
>
> * * * * *

SEC. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

STATEMENT

A. THE BOARD'S FINDINGS

In 1955, respondent Union executed a 3-year collective bargaining contract with the California Trucking Associations, which represented a number of motor truck operators including Los Angeles-Seattle Motor Express, the employer involved in this case (R. 8–9). The provisions of the contract relating to hiring of casual or temporary employees were as follows (R. 55–56, 62–63):

> Casual employees shall, wherever the Union maintains a dispatching service, be employed only on a seniority basis in the Industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any employer who is a party to this Agreement. Seniority rating of such employees shall begin with a minimum of three months service in the Industry, irrespective of whether such employee is or is not a member of the Union.

> Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status. No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available. The employer shall first call the Union or the dispatching hall designated by the Union for such help. In the event the employer is notified that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source.

Pursuant to these terms, the Union maintained a hiring hall for the dispatch of casual employees to Los Angeles-Seattle, as well as to other trucking firms who were parties to the contract.

Lester Slater was a member of the Union, and, for two years, had secured casual employment through the hiring hall (R. 55; 14–17). On August 27, 1955, Slater managed to obtain employment with Los Angeles-Seattle directly, without being dispatched by the Union (R. 39; 29, 67). Upon learning of this fact, the Union complained to the Company that it was violating the contract by employing Slater absent a referral from the Union, and demanded that his employment be terminated. On November 10, the Company complied with the Union's demands and told Slater not to return to work until he "had the matter cleared up." Slater has not worked for the Company since (R. 39; 26–27, 29–30).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the hiring hall provisions of the contract obligated the Company to hire casual employees only through the Union. It further concluded that such an exclusive hiring arrangement unlawfully coerced and encouraged employees to become and remain union members, in violation of Sections 8(a) (3) and (1) and 8(b) (2) and (1)(A) of the Act, in that it did not explicitly contain the safeguards specified in the *Mountain Pacific* decision.[2] In addition, the Board, finding that Slater's loss of employment was the result of the parties' implementation of the illegal hiring provision, concluded that his discharge was also violative of these Sections (R. 37–39).

The Board's order directs the Union and the employer to cease and desist from maintaining or giving effect to the unlawful hiring provisions of the contract and from in any like or related manner restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act (R. 41, 43). It also requires the Union to cease and desist from causing or attempting to cause unlawful discrimination in

[2] In *Mountain Pacific Chapter*, 119 NLRB 883, 897, the Board held that an exclusive hiring hall agreement which delegates control over hiring to the union is violative of the Act unless it explicitly provides that:

1. Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and in no way affected by union membership.

2. The employer retains the right to reject any job applicant referred by the union.

3. The parties shall post for the employees' inspection all provisions relating to the functioning of the hiring agreement, including the foregoing provisions.

employment (R. 43). Affirmatively, the Union is required to notify in writing both the employer and Slater that it has no objection to the latter's employment, and the employer is required to send a similar notice to Slater and the Union (R. 42, 43). Both are ordered to make Slater whole for losses in wages suffered by reason of the discrimination against him. In addition, the Board's order requires Los Angeles and the Union to refund to the casual employees of that employer the initiation fees and dues exacted from them under the illegal hiring arrangement (R. 40), and to post appropriate notices (R. 43–44).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, with one judge dissenting, sustained the Board's unfair labor practice findings, and granted enforcement of its order, except that portion requiring reimbursement of dues and fees paid to the Union by all casual employees. The order was modified to confine the reimbursement feature to Slater alone. (Appendix, pp. 9–12, 15–16, *infra*.)

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' decision on the merits, sustaining the validity of the Board's *Mountain Pacific* standards for exclusive hiring arrangements, is before this Court on the Union's petition, No. 825, October Term, 1959. The Board has filed a memorandum not opposing that petition, and has filed its own petition to review the contrary decision of the Ninth Circuit in *National Labor Relations Board* v. *Hod Carriers*, on the same question, No. 887, this Term.

2. The Court of Appeals' decision on the reimbursement portion of the Board's order presents the question of whether the Board, as a remedy for hiring practices which unlawfully encourage union membership, may require that all monies paid by the employees to the union while subjected to those practices be repaid to them. This remedy, known as the *Brown-Olds* remedy,[1] has been extensively used by the Board with respect such unfair labor practices. The rejection of this remedy by the court below, although consistent with the decisions of the Third, Fifth, Second and Ninth Circuits,[2] is in conflict with the decision of the Seventh Circuit in *National Labor Relations Board* v. *Local 60, United Brotherhood of Carpenters*, 273 F. 2d 699. The union has petitioned for certiorari in the latter case, No. 846, this Term, and, in view of the importance of the question and the conflict of decisions, the Board intends to file a memo-

[1] It was first enunciated in a case by that name. *United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry, and J. S. Brown-E. E. Olds Plumbing and Heating Corp.*, 115 NLRB 594 (1956).

[2] Third Circuit: *National Labor Relations Board* v. *United States Steel Corp. and Local Union 542, Operating Engineers*, No. 13011, April 13, 1960; *National Labor Relations Board* v. *American Dredging Co.*, No. 12918, January 8, 1960; *National Labor Relations Board* v. *Lakeland Bus Lines*, No. 13016, April 14, 1960. Fifth Circuit: *National Labor Relations Board* v. *Local No. 85, Sheet Metal Workers*, 274 F. 2d 344; *National Labor Relations Board* v. *Millwrights' Local 2232*, No. 17777, April 11, 1960. Second Circuit: *Morrison-Knudsen Co.* v. *National Labor Relations Board*, No. 25613, March 2, 1960; *Building Material Teamsters, Local 282* v. *National Labor Relations Board*, Nos. 25608 and 25614, March 2, 1960. Ninth Circuit: *Morrison-Knudsen Co.* v. *National Labor Relations Board*, Nos. 16383 and 16401, February 19, 1960.

randum not opposing the petition. In order to resolve the conflict, it is appropriate that the Court review the decision herein at the same time.

CONCLUSION

For the reasons stated, this cross-petition for certiorari should be granted.

Respectfully submitted.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

I authorize the filing of this cross-petition for a writ of certiorari.

J. LEE RANKIN,
Solicitor General.

MAY 1960.

APPENDIX

In the United States Court of Appeals for the District of Columbia Circuit

No. 14794

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of Order of the National Labor Relations Board and Cross-Application for Enforcement

Decided February 18, 1960

Mr. Bernard Dunau, with whom *Messrs. Herbert S. Thatcher* and *David Previant* were on the brief, for petitioner.

Miss Rosanna A. Blake, Attorney, National Labor Relations Board, with whom *Messrs. Jerome D. Fenton*, General Counsel, National Labor Relations Board at the time the brief was filed, *Thomas J. McDermott*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Mrs. Betty Jane Southard*, Attorney, National Labor Relations Board, were on the brief, for respondent.

Before EDGERTON, WILBUR K. MILLER *and* DANAHER, *Circuit Judges*.

Per Curiam: Local 357 of the Teamsters union asks us to review and set aside, and the National Labor

Relations Board asks us to enforce, an order of the latter which held an exclusive hiring hall agreement constitutes discrimination which encourages union membership within the meaning of Sections 8(a) (3) and (1) and 8(b) (2) and (1)(A) of the National Labor Relations Act as amended, 61 Stat. 136, 65 Stat. 601, 29 U.S.C. § 158. The order directed the respondent employer, Los Angeles-Seattle Motor Express, and the union to cease and desist from performing, maintaining or otherwise giving effect to the condemned hiring hall agreement and to take certain affirmative action which the Board found would effectuate the purposes of the Act.

Among the affirmative acts which the order required of the union and employer jointly was to make whole one Lester H. Slater for any loss he may have suffered from the discrimination which the Board held had been practiced against him under the hiring hall agreement; and to reimburse all casual employees for the initiation fees and dues which, the Board said, had been "exacted from them as the price of their employment."

We think the Board's order is correct except that it goes too far in directing reimbursement of the dues and fees paid to the union by all casual employees. *National Labor Relations Board* v. *American Dredging Co.*, —— F. (2d) —— (3rd Cir. Jan. 8, 1960).[1] The order should be modified to confine the reimbursement feature to Slater alone. As so modified, the Board's order will be enforced.

It is so ordered.

---

[1] We have considered the opinion of the Seventh Circuit in *National Labor Relations Board* v. *Local 60, et al.* —— F. (2d) —— (Jan. 22, 1960), but are constrained to the view that the Third Circuit opinion more aptly applies to the problem presented on the record before us.

EDGERTON, *Circuit Judge, dissenting:* The Board rightly says "The basic issue in this case is the propriety of the Board's finding that the Union's exclusive hiring hall agreement violated the Act on its face." I think this finding is wrong and the order should be set aside.

The court appears to hold that an exclusive hiring-hall agreement is necessarily unlawful. My impression is that "The hiring hall is legal and has always been held so." *N.L.R.B.* v. *Mountain Pacific Chapter of Associated General Contractors, Inc.*, 270 F. 2d 425, 429 (9th Cir. 1959). An "agreement that hiring of employees be done only through a particular union's offices does not violate the Act 'absent evidence that the union unlawfully discriminated in supplying the company with personnel.' 95 N.L.R.B. at 435." *N.L.R.B.* v. *Swinerton*, 202 F. 2d 511, 514 (9th Cir.), *cert. denied* 346 U.S. 814. "'The factor in a hiring-hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer.' *Del E. Webb Construction Co.* v. *N.L.R.B.*, 8 Cir., 1952, 196 F. 2d 841, 845." *Eichleay Corp.* v. *N.L.R.B.*, 206 F. 2d 799, 803 (3d Cir. 1953). The present hiring-hall arrangement expressly negatives any such agreement, by requiring employment to be "only on a seniority basis" irrespective of whether the "employee is or is not a member of the Union." Without violating this agreement, the employer cannot discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership" in the union, in violation of § 8(a)(3) of the Labor Management Relations Act,[1] and the union cannot "cause or attempt to cause an employer to

[1] 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1958).

discriminate against an employee in violation of" that section.[2]

The agreement does not contain the language the Board required in the *Mountain Pacific* case, 119 N.L.R.B. 883, 897, but this does not make it unlawful. *N.L.R.B.* v. *Mountain Pacific Chapter of Associated General Contractors, Inc.*, 270 F. 2d 425, 431 (9th Cir.). "Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed." *Local 24, Internat'l Brotherhood of Teamsters etc.* v. *Oliver*, 358 U.S. 283, 295. The possibility that the arrangement may at some future time lead to unlawful discrimination does not invalidate it. *Shuttlesworth* v. *Board of Education*, 358 U.S. 101, *affirming* 162 F. Supp. 372, 384.

The court upholds the Board's finding that the discharge of employee Slater resulted from the hiring provisions of the contract and was discriminatory. Slater had not obtained or sought employment through the hiring hall. I think his discharge for this reason did not discriminate against him or violate the Act. To interpret the Act as "furnishing statutory protection to employees who choose to violate valid provisions of labor-management contracts" would not be "consistent with the underlying purpose of the Act to promote * * * collective bargaining agreements * * *." *N.L.R.B.* v. *Furriers Joint Council*, 224 F. 2d 78, 80 (2d Cir.). Slater was a member of the Union in good standing. I cannot see that his discharge for failing to comply with an agreement between the Union and the employer encourages union membership.

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[2] § 158(b)(2).

[Copy]

In the United States Court of Appeals for the District of Columbia Circuit

No. 14794 September Term, 1959

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review of Order of the National Labor Relations Board and Cross-Petition for Enforcement

Before EDGERTON, WILBUR K. MILLER, and DANAHER, *Circuit Judges*

JUDGMENT

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the order of the National Labor Relations Board on review in this case be modified as indicated in the opinion of this court and, as so modified, will be enforced.

Pursuant to Rule 38(b) the National Labor Relations Board shall within 10 days hereof serve and

file a proposed enforcement decree consistent with the opinion and judgment of this court.

Per Curiam.

Dated: February 18, 1960.

Separate dissenting opinion by *Circuit Judge* EDGERTON.

[Copy]

United States Court of Appeals
for the
District of Columbia Circuit
Filed Mar. 10, 1960
/s/ JOSEPH W. STEWART,
Clerk.

In the United States Court of Appeals for the District of Columbia Circuit

No. 14794

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before EDGERTON, WILBUR K. MILLER AND DANAHER, *Circuit Judges*

This cause came on to be heard upon the petition of Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America to review an order of the National Labor Relations Board dated October 31, 1958, and upon the Board's cross-application to enforce said order. The Court heard argument of respective counsel on September 16, 1959 and has considered the briefs

and transcript of record filed in this cause. On February 18, 1960, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order as modified and granting in part and denying in part the petition to review. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED BY THE COURT, that the petitioning Union Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America its officers, representatives, and agents, shall:

(a) Cease and desist from:

(1) Performing, maintaining, or otherwise giving effect to provisions of any agreement with Los Angeles-Seattle Motor Express, Incorporated (hereinafter called the Company), or any other employer within the meaning of the National Labor Relations Act (hereinafter called the Act), which unlawfully conditions the hire of applicants for employment, or the retention of employees in employment with any employer, upon referral or clearance by the Petitioner Union, except as authorized by the proviso to Section 8(a)(3) of the Act;

(2) Causing or attempting to cause the Company, or any other employer, to discriminate against employees or applicants for employment in violation of Section 8(a)(3) of the Act;

(3) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8(a)(3) of the Act;

(b) Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Jointly and severally with the Company, make whole Lester H. Slater for any loss of pay he may

have suffered by reason of the discrimination against him, as provided in the Section of the National Labor Relations Board's Decision and Order, dated October 31, 1958, entitled "The Remedy";

(2) Jointly and severally with the Company, reimburse Lester H. Slater for monies illegally exacted from him in the manner and to the extent set forth in the aforesaid Decision and Order.

(3) Notify Lester H. Slater and the Company, in writing, that it has no objection to Slater's employment;

(4) Post at its offices, in conspicuous places, including all places where notices to employees or prospective employees are customarily posted, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Twenty-first Region (Los Angeles, California), shall, after being duly signed by Petitioner's representative, be posted immediately upon receipt thereof and maintained by the Petitioner for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Petitioner to insure that said notice shall not be altered, defaced, or covered by any other material;

(5) Notify the aforesaid Regional Director, in writing, within ten (10) days from the date of this decree, what steps it has taken to comply herewith.

Judge, United States Court of Appeals for the District of Columbia Circuit.

Judge, United States Court of Appeals for the District of Columbia Circuit.

Judge, United States Court of Appeals
for the District of Columbia Circuit.

Circuit Judge Edgerton dissents.
Dated: March 10, 1960

APPENDIX A

NOTICE

TO ALL EMPLOYEES OF AND APPLICANTS FOR EMPLOYMENT WITH LOS ANGELES-SEATTLE MOTOR EXPRESS, INCORPORATED

PURSUANT TO

a Decree of the United States Court of Appeals enforcing, as modified, an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT perform, maintain, or otherwise give effect to the provisions of any agreement with Los Angeles-Seattle Motor Express Incorporated, or with any other employer, which unlawfully conditions the hire of applicants for employment, or the retention of employees in employment with any employer, upon referral or clearance by any labor organization, except as authorized by Section 8(a)(3) of the Act.

WE WILL NOT cause or attempt to cause the above-named employer, or any other employer, to discriminate against employees or applicants for employment in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the

rights guaranteed them in Section 7 of the Act, except in a manner permitted by Section 8(a)(3) of the Act.

WE WILL reimburse Lester H. Slater for the initiation fees and dues he was illegally required to pay to our union as a result of the unlawful hiring provisons in our contract with the aforementioned company.

WE WILL make whole Lester H. Slater for any loss of pay suffered as a result of the discrimination against him.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 357

(Labor Organization)

Dated ------ By ----------

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

U.S. GOVERNMENT PRINTING OFFICE:1980